

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KIRK FILLMAN,)	
)	
Plaintiff,)	Civ. No. 05-6346-TC
)	
vs.)	
)	
)	OPINION AND ORDER
)	
OFFICEMAX, INCORPORATED,)	
a Corporation of Delaware, fka)	
BOISE CASCADE CORPORATION,)	
A Delaware corporation, and)	
BOISE CASCADE, L.L.C., a)	
limited liability company,)	
)	
Defendants.)	

COFFIN, Magistrate Judge.

Before the court is Boise Cascade L.L.C.'s Motion for Summary Judgment (#35) and Supplemental Motion for Summary Judgment (#127), and OfficeMax Incorporated's Motion for Summary Judgment (#40). For the reasons that follow, summary judgment is granted in defendants' favor and this action is dismissed.

BACKGROUND

The record discloses the following facts. OfficeMax Incorporated (OfficeMax) hired plaintiff in 1991. Sprauer Decl.

1 ¶ 2. A member of the Association of Western Pulp and Paper
2 Workers Union, plaintiff's employment terms and opportunities
3 were governed by a collective bargaining agreement (CBA). The
4 CBA set forth rules allowing employees to bid on available
5 positions based on seniority and experience according to an
6 employment "ladder." Sprauer Decl. ¶ 3.

7 Plaintiff occupied a number of ladder positions. By 2002,
8 he attained the position of #1 Willsheeter First Assistant.
9 Fillman 29, 242. Plaintiff opted to work as a sample and label
10 clerk from March to September of 2003 and then returned to the #1
11 Willsheeter First Assistant position. Fillman 66-67, 69.

12 Plaintiff also occasionally served as a temporary relief
13 supervisor to oversee particular projects or to supervise the
14 plant when no other supervisor was available. Fillman 80, 209,
15 241. Plaintiff took on the supervision duties while maintaining
16 his regular "ladder" job; under the CBA, there is no permanently
17 designated relief supervisor position. Sprauer 36, 50; Fillman
18 271.

19 On May 31, 2002, plaintiff suffered an injury to his right
20 shoulder due to a car accident. Fillman 29, 33, 42. He
21 requested time off and was returned to work on August 19, 2002.
22 At that time, he returned to work but was restricted to "light
23 duty" tasks, defined as work "performed at a desk and/or waist
24 level. No heavy lifting." Boise Cascade Ex. 4. OfficeMax
25 provided plaintiff work that met those restrictions by assigning
26 him the role of United Way Loaned Executive and relief supervisor
27 from August through December of 2002. Fillman 47, 97.

28 In January, 2003, plaintiff was granted leave to undergo
2 Opinion and Order

1 surgery on his injured shoulder. On January 30, he was released
2 to return to work with restrictions against lifting and overhead
3 reaching. Fillman 48, 64, 66; Nelson 50. After his return,
4 Fillman chose an open ladder job as a sample and label clerk,
5 which began in March 2003. In June 2003, Fillman was released to
6 regular duty with no medical restrictions. Fillman 73. He
7 returned to the #1 Willsheeter First Assistant position in
8 December 2003.

9 In January 2004, plaintiff underwent a second surgery on his
10 right shoulder, for which he was granted leave. Fillman 71, 72,
11 75.

12 During plaintiff's leave, OfficeMax posted a new management
13 position of Finishing Shift Supervisor. Fillman 79. OfficeMax's
14 Human Resources Coordinator, Therese Sprauer, gave notice of the
15 opening and plaintiff applied. Fillman 241, Sprauer 76. Fillman
16 interviewed for the job, along with six other candidates.
17 Sprauer 78. The candidates were scored based on their responses
18 to the interview questions. Sprauer 84. The two top scorers
19 were Kristen Hurst and Joe Rodriguez. Hurst was ultimately
20 selected because she had superior supervisory experience, even
21 though Rodriguez had the higher interview score. Sprauer 81, 84-
22 86. Plaintiff ranked fourth and was not selected largely because
23 he provided incomplete responses and interviewed poorly. Sprauer
24 81, 84. Plaintiff requested a meeting to discuss why he was not
25 selected; there, Sprauer explained that he did not interview well
26 and gave the impression that he was entitled to the position.
27 Fillman 103, Sprauer 87, 89.

28 In February 2004, plaintiff was released to light duty work

1 with restrictions against lifting with his right arm. Fillman
2 79, 106. OfficeMax did not have available work that met
3 plaintiff's restrictions; in March and April of 2004, plaintiff
4 was trained in insurance sales and began selling insurance on his
5 own time. Fillman 94, 115, 122.

6 In May 2004, OfficeMax offered plaintiff light duty work,
7 which plaintiff accepted for a two-week period. Plaintiff did
8 not return to the plant to work after June 2004. Fillman 123.

9 In August 2004, Sprauer wrote to plaintiff requesting an
10 update on his medical restrictions. Sprauer Decl. ¶ 10.
11 Plaintiff reported that he believed his restrictions would be
12 permanent. Fillman 125. In September 2004, plaintiff's
13 physician determined that his condition was stationary and his
14 injuries permanent. Fillman 150. OfficeMax referred plaintiff
15 for an independent medical exam in order to determine whether
16 plaintiff's restrictions were permanent and whether he would be
17 able to return to his job as #1 Willsheeter First Assistant.
18 Fillman 126, 188-89. On October 28, 2004, the IME physician
19 determined that plaintiff's permanent restrictions limited him
20 from lifting more than 25 pounds and repetitive overhead
21 reaching. Fillman 175-76. Plaintiff nonetheless retained his
22 seniority, the #1 Willsheeter First Assistant position, and the
23 attendant benefits. Sprauer Decl. ¶ 12.

24 The following day, October 29, OfficeMax sold its
25 manufacturing and timberland assets, which included the plant at
26 which plaintiff worked, to Boise Cascade, L.L.C (Boise Cascade).
27 On that day, all OfficeMax employees were terminated and then
28 immediately employed by Boise Cascade. Fillman 155; Sprauer

Decl. ¶ 11. Boise Cascade hired Fillman as #1 Willsheeter First Assistant and met with him on November 1 concerning his medical restrictions. Fillman 181, 196; Sprauer 104, 105. There, all present (including plaintiff) agreed that plaintiff's medical restrictions prevented him from performing the essential functions of the #1 Willsheeter First Assistant position, and no available positions met plaintiff's restrictions. Fillman 181, 196, 243; Sprauer 104. Boise Cascade continued plaintiff's medical leave pursuant to the CBA and agreed to monitor open positions plaintiff might be able to fill. Sprauer 106.

Boise Cascade did so for the next 18 months. In February 2006, Boise Cascade notified plaintiff of an administrative technician position that met plaintiff's medical restrictions. Plaintiff chose not to apply. Fillman 182-183, 244-45.

In June 2006, plaintiff had been absent from the plant for two years. His medical condition had not changed, and there were no available positions that met his restrictions. Fillman 1/8/07, 282-83. Under the terms of the CBA, Boise Cascade was no longer required to maintain plaintiff's seniority and benefits. Sprauer 125-26, Ex. 61; Fillman 200-01, OfficeMax Ex. 6; 280, OfficeMax Ex. 7. Accordingly, Boise Cascade terminated plaintiff's employment. Sprauer Decl ¶ 2; Sprauer 125-26; Fillman 284-85.

Plaintiff filed this action against OfficeMax and Boise Cascade in November 2005. He alleges that both defendants discriminated against him on the basis of a disability, in violation of 42 U.S.C. § 12112 and Or. Rev. Stat. § 659A.112; that both violated state and federal family leave law, 29 U.S.C.

1 §§ 2614-2615 and Or. Rev. Stat. § 659A.153; and that both are
2 liable for wrongful discharge under Oregon tort law. Plaintiff
3 also brings a number of claims against OfficeMax only:
4 discrimination on the basis of sex and race, in violation of 42
5 U.S.C. § 2000e; intentional infliction of emotional distress;
6 and, reckless infliction of emotional distress. Both defendants
7 now move for summary judgment on all claims. For the following
8 reasons, I grant defendants' motions.

9
10 STANDARD

11 Summary judgment is appropriate where "there is no genuine
12 issue as to any material fact and . . . the moving party is
13 entitled to a judgment as a matter of law." Fed. R. Civ. P.
14 56(c). On a motion for summary judgment, all reasonable doubt as
15 to the existence of a genuine issue of fact is resolved against
16 the moving party, Hector v. Wiens, 533 F.2d 429, 432 (9th Cir.
17 1976), and any inferences drawn from the underlying facts are
18 viewed in the light most favorable to the nonmoving party.
19 Valadingham v. Bojorquez, 866 F.2d 1135, 1137 (9th Cir. 1989).

20 The initial burden is on the moving party to point out the
21 absence of any genuine issue of material fact. Once the initial
22 burden is satisfied, the burden shifts to the opponent to
23 demonstrate through the production of probative evidence that
24 there remains an issue of fact to be tried. Celotex Corp. v.
25 Catrett, 477 U.S. 317 (1986).

26 Rule 56(c) mandates the entry of summary judgment against a
27 party who fails to make a showing sufficient to establish the
28 existence of an element essential to that party's case, and on

1 which that party will bear the burden of proof at trial. In such
 2 a situation, there can be "no genuine issue as to any material
 3 fact," since a complete failure of proof concerning an essential
 4 element of the nonmoving party's case necessarily renders all
 5 other facts immaterial. The moving party is "entitled to a
 6 judgment as a matter of law" because the nonmoving party has
 7 failed to make a sufficient showing on an essential element of
 8 her case with respect to which she has the burden of proof. Id.
 9 at 323-24.

10 ANALYSIS

11 42 U.S.C. § 12112 (ADA) and Or. Rev. Stat. § 659.112A Claims

12 I turn first to plaintiff's state and federal claims of
 13 disability discrimination. In order to warrant protection under
 14 either standard, plaintiff must demonstrate that he suffers from
 15 a physical or mental impairment that substantially limits one or
 16 more of his major life activities, that he has a record of such
 17 impairment, or that his employer regarded him as having such an
 18 impairment. Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1113 (9th
 19 Cir. 2000) (en banc), vacated on other grounds, 535 U.S. 391
 20 (2002); ORS 659A.100(1)(a).¹ "'Major life activities' means
 21 functions such as caring for oneself, performing manual tasks,
 22 walking, seeing, hearing, speaking, breathing, learning, and
 23 working." 29 C.F.R. § 1630.2(I).

24 Plaintiff first asserts that he suffers from an actual
 25 disability, that is, an impairment to his right shoulder that
 26

27 ¹ Oregon disability law is construed to the extent possible to
 28 follow similar ADA provisions. Evans v. Multnomah County Sheriff's
Office, 57 P.3d 211 (Or. 2002).

1 substantially limits certain activities. He contends that his
 2 shoulder injury has weakened his softball pitching and made
 3 vacuuming painful and starting a lawnmower more difficult.
 4 Fillman 143-47. He further contends that the shoulder injury
 5 substantially limits his ability to lift, because he cannot lift
 6 more than 25 pounds, and his ability to reach. Fillman 139,
 7 Boise Cascade Ex. G, 146, 153-155.

8 Those effects, which defendants do not contest, do not rise
 9 to the level of impairment that governing law recognizes as
 10 "substantial."² An impairment "substantially limits" an
 11 individual who becomes, as a result of the impairment,

12 (i) Unable to perform a major life activity that
 13 the average person in the general population can
 perform; or

14 (ii) Significantly restricted as to the
 15 condition, manner or duration under which an
 16 individual can perform a particular major life
 17 activity as compared to the condition, manner,
 or duration under which the average person in
 the general population can perform that same
 major life activity.

18 29 C.F.R. § 1630.2(j)(1); see also Or. Rev. Stat. §
 19 659A.100(2)(D)(B) (describing substantially similar standard).
 20 Factors used in considering whether a limitation is "substantial"
 21 include:

22 (i) The nature and severity of the impairment;

23 (ii) The duration or expected duration of the
 24 impairment; and

25 (iii) The permanent or long term impact, or the
 26 expected permanent or long term impact of or

27 ²Because I determine that plaintiff does not suffer any
 28 substantial limitation, I need not consider whether any of the
 activities at issue qualify as "major life activities."

1 resulting from the impairment.

2
3 29 C.F.R. § 1630.2(j)(2); Or. Admin. R. 839-006-0212. When an
4 impairment renders activities more painful or difficult but does
5 not prevent the activity outright, the fact of a diminution in
6 ability will not, in itself, constitute a substantial limitation.
7 Thornton v. McClatchy Newspapers, Inc., 292 F.3d 1045, 1046 (9th
8 Cir. 2002).

9 Here, plaintiff testified that, despite his shoulder injury,
10 he is still able to throw and coach softball, though his pitch is
11 weak and causes pain. Fillman 145. Moreover, vacuuming with his
12 right arm causes pain, he is able to run the vacuum with his left
13 arm, albeit awkwardly. Fillman 147. In view of the considerations
14 set forth in the governing regulations, these limitations, and the
15 fact that he has a "hard time" starting the lawnmower, are minor
16 and therefore do not constitute significant restrictions on his
17 ability to complete manual tasks.

18 Plaintiff further argues that the 25-pound lifting restriction
19 constitutes a substantial limitation on the activities of working
20 and lifting.³ A number of courts have determined that a
21 restriction against lifting items heavier than 25 pounds does not
22 impose a significant restriction on the "condition, manner, or
23 duration" of lifting in comparison to the abilities of the "average

24 ³Lifting is identified as a major life function in the state
25 regulation, Or. Admin. R. 839-006-0205(6)(a), but not in the
26 federal regulations. "Federal cases generally consider lifting
27 restrictions as they impact a plaintiff's ability to perform major
28 life functions such as self-care and work." Galenbeck v. Newman &
Newman, Inc., No. 02-6278-HO, WL 1088289 at *5 (D. Or., May 14,
2004).

1 person in the general population." 29 C.F.R. § 1630.2(j)(1)(i).
2 In the similar case of Thompson v. Holy Family Hosp., 121 F.3d 537,
3 539 (9th Cir. 1997), the plaintiff was released to work with a
4 restriction against lifting items heavier than 25 pounds. Standing
5 alone, that restriction could not demonstrate a substantial
6 limitation on the activities of working or lifting, and summary
7 judgment in favor of defendant on plaintiff's disability claim was
8 upheld. See also Williams v. Channel Master Satellite Systems,
9 Inc., 101 F.3d 346, 349 (4th Cir. 1996); Aucutt v. Six Flags Over
10 Mid-America, Inc., 85 F.3d 1311, 1319 (8th Cir. 1996) (holding
11 same). Likewise, I cannot hold that plaintiff has demonstrated a
12 substantial limitation on the major life activity of lifting.

13 In order to demonstrate a substantial limitation on the major
14 life activity of "working," plaintiff must demonstrate that he is
15 restricted in his ability to perform either a single class of jobs,
16 or a broad range of various types of employment as compared to an
17 average person having comparable training, skills, and abilities.
18 29 C.F.R. § 1630.2(j)(3)(I); Or. Admin. R. 839-006-0205(6)(b). The
19 court may consider factors such as

20 (A) [t]he geographical area to which the individual
21 has reasonable access;

22 (B) [t]he job from which the individual has been
23 disqualified because of an impairment, and the
24 number and types of jobs utilizing similar training,
25 knowledge, skills or abilities, within that
26 geographical area, from which the individual is also
27 disqualified because of the impairment (class of
28 jobs); and/or

(C) [t]he job from which the individual has been
disqualified because of an impairment, and the
number and types of other jobs not utilizing similar
training, knowledge, skills or abilities, within
that geographical area, from which the individual is
also disqualified because of the impairment (broad

1 range of jobs in various classes).

2 29 C.F.R. § 1630.2(j)(3)(ii). Plaintiff has not put forth any
3 evidence to demonstrate that he is prevented from performing work
4 that would categorically qualify him as disabled. Plaintiff bears
5 that burden, once defendants have pointed out the absence of
6 evidence in the record. Celotex Corp., 477 U.S. at 323. He argues
7 that because he is unable to perform the essential duties of the #1
8 Willsheeter First Assistant position, he is disqualified from a
9 broad class of manufacturing and production jobs. However,
10 plaintiff's own record of employment at OfficeMax indicates that he
11 can contribute to those fields as a supervisor and in light duty
12 capacities. In the absence of any evidence in the record to the
13 contrary, I cannot hold that plaintiff's restriction against lifting
14 items heavier than 25 pounds and repetitive reaching with one arm
15 constitutes a substantial limitation on the major life activity of
16 working.

17 Finally, plaintiff asserts that his injury substantially limits
18 the major life activity of reaching, see Or. Admin. R.
19 839-006-0205(6)(a), presumably because he is restricted from work
20 involving repeated overhead reaching with his right arm. However,
21 plaintiff has testified that he is able to reach overhead
22 occasionally, Fillman, 146, and sufficiently reach to throw a
23 softball the distance from a mound to the plate, but "not without
24 a bounce." Fillman 145. The record supports a diminution in his
25 ability to reach, but not a substantial limitation. In sum, the
26 record does not permit a determination that plaintiff suffers an
27
28

1 actual disability under the relevant standards.⁴

2 Plaintiff argues in the alternative that he has a record of an
3 impairment that substantially limits his major life activities.
4 Plaintiff bases this argument on employee records demonstrating (1)
5 the lifting and reaching restrictions previously discussed and (2)
6 leaves of absence taken during his convalescence from his car
7

8 ⁴Plaintiff argues that, rather than limited to a 25-pound
9 restriction, he is instead limited to lifting items heavier than
10 ten pounds on a repeated basis. The record does not clearly
11 support that contention; plaintiff testified that his restriction
12 limits him to lifting more than 25 pounds, Fillman 154, 175, 176.
13 Plaintiff's treating physician and the independent medical examiner
14 shared that conclusion. Fillman 176. However, plaintiff asserts
15 that he is limited to lifting ten pounds, based on a statement made
16 by the independent medical examiner, who made the assessment based
17 on "virtually no medical records," but instead on a description of
18 plaintiff's condition in a letter from his attorney. Plaintiff's
19 Counsel Decl. Ex. 24. The independent medical examiner later
20 finalized his assessment, after receiving plaintiff's medical
21 records, and concluded that plaintiff "would not be able to do
22 repetitive reaching, overhead work or lifting more than 25 lbs."
23 Plaintiff's Counsel Decl. Ex. 25.

24 Even if plaintiff were, in fact, restricted to lifting less
25 than ten pounds, that restriction, along with repetitive reaching
26 limitations, would not render him disabled under the governing
27 regulations. In comparison to the level of ability in the general
28 population, the restriction would not, as a matter of law,
constitute a substantial limitation on the major life activities of
lifting, see, e.g., Marinelli v. City of Erie, P.A., 216 F.3d 354,
364 (4th Cir. 2000), or working, see Mays v. Principi, 301 F.3d
866, 870-71 (7th Cir. 2002) (doubting "whether lifting more than 10
pounds is" a restriction on any major life activity).

In any case, there is no indication that the ten-pound lifting
restriction was permanent. See Stoltman v. Federal Express Corp.,
Civ. No 01-60-A, WL 32783976, *5 (D. Or., May 20, 2002)
(restriction against lifting more than 12 pounds and nonpermanent
inability to lift more than ten pounds did not constitute a
substantial limitation on any major life activity).

Notably, the single case that plaintiff cites in order to
substantiate the contention that a ten-pound restriction on lifting
creates a genuine issue of material fact concerning whether an
individual suffers a substantial limitation on a major life
activity, Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170 (10th
Cir. 1996), is factually remote from plaintiff's situation. In
Lowe, the plaintiff also suffered from multiple sclerosis and was
restricted against lifting items heavier than fifteen pounds on a
repeated basis. 87 F.3d at 1174.

1 accident and two shoulder surgeries. Those items cannot constitute
2 a "record" of a substantial limitation to a major life activity
3 under federal or state law.

4 In order to qualify, the record must show an impairment that
5 would establish an "actual disability" under the standard discussed
6 above. Coons v. Dept. of the Treas., 383 F.3d 879, 886 (9th Cir.
7 2004); Walz v. Marquis Corp., No. CV-03-1468-ST, WL 758253, at *6)
8 (D. Or. 2005). Because plaintiff's lifting and reaching
9 restrictions cannot substantiate an actual disability, records of
10 those restrictions cannot serve as records of a substantial
11 limitation to a major life activity. Moreover, the records
12 demonstrating plaintiff's leaves of absence demonstrate only
13 temporary periods of recovery and not a restriction whose
14 "condition, manner or duration" imposes a significant limitation on
15 a major life activity. Standing alone, they cannot create a record
16 of a disability.

17 Plaintiff asserts, as another alternative argument, that he
18 qualifies as "disabled" under federal and state standards because
19 OfficeMax and Boise Cascade regarded him as being disabled. In
20 order to be "regarded" as disabled, plaintiff must demonstrate that
21 he

22
23 (1) Has a physical or mental impairment that does
24 not substantially limit major life activities but
is treated by a covered entity as constituting such
limitation;

25 (2) Has a physical or mental impairment that
26 substantially limits major life activities only as
27 a result of the attitudes of others toward such
impairment; or

28 (3) . . . is treated by a covered entity as having
a substantially limiting impairment.

1 29 C.F.R. § 1630.2(1). Plaintiff argues that OfficeMax's action in
2 directing him to undergo an independent medical examination and
3 both employers' offers of employment that met his medical
4 restrictions supports the conclusion that they regarded him as
5 disabled. Plaintiff's argument is unavailing.

6
7 Plaintiff has not demonstrated the existence of an issue of
8 fact that would show that either employer treated him as having a
9 "substantial[] limit[ation on a] major life activity" or a
10 "substantially limiting impairment" despite the fact that he had no
11 such limitation. See 29 C.F.R. § 1630.2(1), (3). Plaintiff
12 points to the fact that his employers knew that he suffered effects
13 from his shoulder injury, but that knowledge alone does not
14 indicate that either employer perceived plaintiff to have a
15 substantial limitation on any life activity. See Thompson, 121
16 F.3d at 541 (employer's knowledge that employee could not lift more
17 than 25 pounds did not demonstrate that employer regarded her as
18 disabled).

19 Moreover, by directing plaintiff to undergo an independent
20 medical evaluation, OfficeMax demonstrated only that it required
21 confirmation concerning plaintiff's claims about the nature and
22 duration of his limitations, not that already it concluded
23 plaintiff to be disabled. See Tice v. Centre Area Transp. Auth.,
24 247 F.3d 506, 515 (3d Cir. 2001) (holding that directing employee
25 to undergo exam can indicate employer's doubts about an employee's
26 ability to perform a job, but cannot be bootstrapped to demonstrate
27 conclusion that employee is regarded as disabled). OfficeMax, and
28 then Boise Cascade, regarded plaintiff as capable of working a

1 number of jobs notwithstanding his injury and encouraged him to
2 apply when opportunities arose. Nothing in the record raises a
3 genuine issue of material fact that would support the conclusion
4 that either employer regarded plaintiff as disabled.

5 In sum, plaintiff has failed to demonstrate that he qualifies
6 as "disabled" under federal or state law; as such he is ineligible
7 for any relief on the claim of discrimination on the basis of
8 disability. Summary judgment in defendants' favor on plaintiff's
9 42 U.S.C. § 12112 and Or. Rev. Stat. § 659.112A claims is
10 warranted.

11
12 FMLA and OFLA Claims

13 (1) FMLA Interference

14 29 U.S.C. § 2615(a)(1) prohibits an employer from interfering
15 with, restraining or denying an employee's rights under the FMLA.
16 "Interference" includes refusing to authorize FMLA leave,
17 discouraging an employee from using FMLA leave, and "manipulation
18 by a covered employer to avoid responsibilities under FMLA." 29
19 C.F.R. § 825.220(b). The Ninth Circuit has held that an employee
20 who alleges that he "suffered negative consequences . . . simply
21 because he has used FMLA leave" or was deterred from participating
22 in protected activities states a claim for "interference."
23 Bachelder v. America West Airlines, Inc., 259 F.3d 1112, 1124 (9th
24 Cir. 2001).

25 Plaintiff does not dispute that he was granted all requested
26 leave. Rather, he asserts that OfficeMax interfered with his
27 ability to take FMLA leave by failing to restore him to the #1
28 Willsheeter First Assistant position after he returned from his
15 Opinion and Order

1 three periods of FMLA leave.⁵ That contention cannot support an
2 FMLA interference claim.

3 Fillman does not dispute, however, that after returning from
4 each FMLA leave, he was unable to perform the essential functions
5 of that position. Fillman 45, 64, 79. "An employee who is unable
6 to perform the essential functions of the position following the
7 leave period has 'no right to restoration to another position under
8 the FMLA.'" Farrell v. Tri-Metropolitan Transp. Dist., No. CV
9 04-296-PA, WL 1371656, *2, (D. Or., May 15, 2006) (quoting 29
10 C.F.R. § 825.214(b)).

11
12 (2) FMLA Retaliation

13 Plaintiff further contends that OfficeMax and Boise Cascade
14 retaliated against him for taking FMLA leave. Specifically, he
15 argues that both defendants retaliated against him by failing to
16 restore him to the #1 Willsheeter First Assistant position after he
17 returned from his FMLA leave, that OfficeMax retaliated against
18 plaintiff by failing to provide him with "safety points," and that
19 Boise Cascade retaliated by eventually terminating him. Again,
20
21
22

23
24 ⁵ Plaintiff also seems to suggest that OfficeMax took adverse
25 action against him by not appointing him as relief supervisor after
26 taking FMLA leave. The role of relief supervisor is not a ladder
27 position; rather, it is a temporary role assigned on a nonpermanent
28 basis. Neither party argues that, under the CBA, prior tenure as a
relief supervisor would entitle an employee to ongoing or future
assignment to that role. In any case, plaintiff has not
demonstrated the existence of a genuine issue of material fact that
would indicate that the decision not to assign the relief
supervisor role to him was made in response to his FMLA requests.

1 plaintiff cannot withstand summary judgment.⁶

2 First, as explained above, plaintiff had no right to
3 restoration to the willsheeter position. No fact in the record
4 supports the inference that defendants' "failure" to restore him
5 was a consequence of plaintiff's FMLA leave.

6 Second, the deposition excerpt that plaintiff cites to support
7 his contention that he was deprived of "safety points" because of
8 his leave status does not substantiate his argument. Rather, the
9 deponent acknowledged that the Recognition Team, apparently a
10 committee that encouraged praiseworthy employee practices,
11 discussed disallowing "safety points" to employees who underwent
12 any sort of extended leave. Pltf's Ex. 6 at 81-83. There is no
13 indication that plaintiff was disallowed safety points or that, if
14 he was, such alleged action was taken in response to his FMLA leave
15 requests.

16 Similarly, the record does not support plaintiff's third
17 contention. OfficeMax terminated plaintiff when it terminated
18 every other individual in its employ, upon its sale to Boise
19

20 ⁶The Ninth Circuit Court of Appeals has left open the issue of
21 whether McDonnell Douglas analysis applies in an anti-retaliation
22 action under § 2615(a)(2). Xin Liu v. Amway Corp., 347 F.3d 1125,
23 1135, 1136 n. 10 (9th Cir. 2003). In the absence of any mandatory
24 authority requiring the court to apply the burden-shifting analysis
25 of McDonnell Douglas, I proceed by inquiring whether the record
26 discloses a genuine issue of material fact concerning whether
27 plaintiff was terminated due to his FMLA requests. But see Price
28 v. Multnomah County, 132 F. Supp. 2d 1290, 1296 (D. Or. 2001)
(applying burden-shifting analysis in FMLA retaliation claim).
Even if the burden-shifting analysis applies, however, plaintiff's
claim would not withstand summary judgment because defendants have
put forth legitimate, nondiscriminatory reasons for not restoring
plaintiff to the #1 Willsheeter First Assistant position and for
eventually terminating him, and plaintiff has not adduced any fact
in the record to indicate that the explanations for those actions
were pretextual.

1 Cascade; there is no fact in the record to support the inference
 2 that the termination was designed to retaliate against plaintiff
 3 for having taken FMLA leave months before. Boise Cascade then
 4 hired plaintiff and fulfilled its duties under the CBA. No fact in
 5 the record supports the inference that Boise Cascade terminated
 6 plaintiff on the basis of his requests for FMLA leave two years
 7 prior from Boise Cascade's predecessor, OfficeMax. Summary
 8 judgment on plaintiff's FMLA claims is warranted.

9
 10 (3) OFLA Claims

11 Plaintiff bases his OFLA claims on the same reasoning used to
 12 support his FMLA interference and retaliation claims. Plaintiff's
 13 OFLA claims cannot withstand summary judgment. Unlike FMLA, OFLA
 14 does not provide a cause of action for "interference" with an
 15 employee's ability to request OFLA leave or for retaliation against
 16 an employee for having made an OFLA request.⁷ Rather, plaintiff's
 17 claim is limited to an alleged denial of leave under Or. Rev. Stat.

18
 19 ⁷ Like the court in Alexander v. Eye Health Northwest, P.C.,
 20 No. CV-05-1632-HU, WL 2850469, *5 n. 3 (D. Or., Oct. 3, 2006), I
 21 acknowledge that the Oregon Court of Appeals recognized the
 22 existence of an OFLA retaliation claim. Yeager v. Providence
 23 Health System Oregon, 96 P.3d 862 (Or. App), rev. denied, 103 P.3d
 24 641 (Or. 2004), I reject the analysis in Yeager for the same
 25 reasons cited in Alexander, viz., "on the ground that a retaliation
 26 cause of action is not made an unlawful practice in the OFLA
 27 statutes themselves, so that a BOLI regulation purporting to create
 28 a retaliation cause of action under OFLA, Or. Admin. R. §
 839-009-0320(3), is beyond the authority delegated to BOLI by the
 legislature." Alexander, WL 2850469, *5 n. 3; see also Vestar Dav.
II, L.L.C., v. General Dynamics Corp., 249 F.3d 958, 960 (9th Cir.
 2001) (federal courts are required to follow the highest state
 court on questions of state law, but not intermediate courts).
 Even if an OFLA retaliation or interference claim were available to
 plaintiff, it would fail on the merits for the reasons described
 in the discussion of plaintiff's FMLA interference and retaliation
 claims.

1 § 659A.183.

2 As explained above, there is no dispute that plaintiff was
3 granted all leave requested. For this reason, no relief is
4 available to plaintiff under OFLA, and defendants' motions for
5 summary judgment on these claims are granted.

6
7 Title VII Claims (against OfficeMax only)

8 Plaintiff alleges that he suffered disparate treatment on the
9 basis of his sex and race in violation of Title VII. He attempts
10 to substantiate this claims by contending that OfficeMax denied him
11 a promotion in February 2004 and constructively discharged him in
12 May 2004 for discriminatory reasons.

13 On the failure to promote claim, plaintiff is required to make
14 a prima facie showing that (1) he is a member of a protected class;
15 (2) that he applied for an open job for which he was qualified; (3)
16 he was rejected; and, (4) the job was filled by an individual not
17 belonging to a protected class. McGinest v. GTE Service Corp., 360
18 F.3d 1103, 1122-23 (9th Cir. 2004). "Title VII applies to all
19 racial groups, whether majority or minority," and therefore
20 protects Caucasian employees from discrimination. Moran v. Selig,
21 447 F.3d 748, 753 (9th Cir. 2006) (citing McDonald v. Santa Fe
22 Trail Transp. Co., 427 U.S. 273, 278-80 (1976)).

23 Under the McDonnell Douglas burden-shifting analysis,
24 OfficeMax may rebut the prima facie case by providing evidence that
25 it had a legitimate, nondiscriminatory reason for promoting a
26 member who is not a member of a protected class. McGinest, 360
27 F.3d at 1123. If OfficeMax meets that burden, in order to
28 withstand summary judgment, plaintiff must then present evidence
19 Opinion and Order

1 demonstrating that OfficeMax's reason for deciding not to promote
2 him was pretextual. Id.

3 Here, plaintiff, a Caucasian male, applied for a position
4 filled by a woman, Kristen Hurst. Because he eventually placed
5 fourth in the rankings of candidates for the position, I assume
6 that he had qualifications sufficient to carry his burden on the
7 prima facie case.

8 OfficeMax, however, has rebutted plaintiff by putting forth
9 evidence of legitimate, nondiscriminatory reasons for hiring a
10 female candidate. In a uniform process, in which candidates were
11 asked similar questions and scored individually, Hurst scored
12 higher than plaintiff. Although she did not score as high on the
13 interview questions as another male candidate, Rodriguez, Hurst was
14 ultimately selected because she had a record of superior management
15 experience in comparison to Rodriguez.

16 Plaintiff has failed to put forth any evidence that
17 OfficeMax's stated reasons for deciding not to promote him serve
18 only as pretext to hide a discriminatory intent. Plaintiff argues
19 that the fact that Rodriguez, who scored higher on the interview
20 component of the process, was also not ultimately selected for the
21 job. In plaintiff's view, that information demonstrates an alleged
22 bias against male candidates. However, plaintiff's analysis does
23 not account for the fact that the ultimate decision rested on both
24 interview performance and supervisory experience. Plaintiff cannot
25 rest his allegation of bias on a selective portrayal of the race-
26 neutral and gender-neutral considerations that comprised the
27 appointment criteria. Plaintiff also seems to assert that he
28 suffered disparate treatment because the second most qualified

1 candidate, a Hispanic male, received advice after the interview
2 about how he could improve his skills. However, plaintiff, too,
3 received assistance after the interview process. At plaintiff's
4 request, Sprauer, an interview committee member and OfficeMax's
5 Human Resources Coordinator, met with plaintiff, reviewed the
6 decision-making process and explained the deficiencies that the
7 committee had identified in plaintiff's, experience, interview
8 performance, and responses to the committee's questions. No fact
9 in the record supports plaintiff's allegations.

10 Similarly, plaintiff's claim that he was "constructively
11 discharged" in May 2004 on the basis of race and sex cannot
12 withstand summary judgment. Apparently, plaintiff's "constructive
13 discharge" allegation is based on the supposition that OfficeMax
14 failed to continue to provide light duty work for him on the basis
15 of his sex or race, resulting in his inability to continue to work.
16 Plaintiff has not clarified the basis of the claim in his briefing.
17 As an initial matter, the record indicates that OfficeMax provided
18 plaintiff with work that met his restrictions during that month, as
19 it had in 2002 and 2003. Plaintiff has not demonstrated that any
20 other light duty opportunities became available at OfficeMax after
21 May 2004. OfficeMax maintained his job, benefits, and seniority
22 until the sale of the facility to Boise Cascade. Plaintiff has not
23 alleged any fact concerning work conditions or employer behavior
24 that would have made the workplace intolerable to him; rather,
25 plaintiff's inability to work was caused solely by his shoulder
26 injury. He was not constructively discharged, nor was he denied
27 light duty assignments on the basis of his sex or race.

28 In sum, plaintiff has failed to demonstrate the existence of
21 Opinion and Order

1 a genuine issue of material fact that would support his sex and
2 race discrimination claims. Summary judgment in OfficeMax's favor
3 is appropriate.

4
5 Wrongful Discharge

6 Plaintiff further alleges that he was wrongfully terminated,
7 apparently by Boise Cascade, "because he requested that disability
8 discrimination not occur in the workplace." Second Amended
9 Complaint, 18.

10 A wrongful discharge claim does not provide plaintiff an
11 avenue of relief in this action. As an initial matter, OfficeMax
12 was not obliged to provide work that accommodated plaintiff's
13 medical restrictions under state or federal law. See Bass v. The
14 County of Butte, 197 Fed. Appx. 655, 657 (9th Cir. 2006) (employer
15 has no duty to accommodate employee who is not a "qualified
16 individual with a disability" under the ADA). Nonetheless, its
17 agent apprised plaintiff of opportunities for which he would be
18 eligible to apply notwithstanding his restrictions. Plaintiff
19 opted to take advantage of some of those opportunities.

20 He alleges that, once his temporary position ended in June
21 2004, he was constructively discharged, apparently because no
22 subsequent positions opened up prior to the sale of OfficeMax to
23 Boise Cascade. As noted above, OfficeMax had no obligation to
24 accommodate plaintiff. The record simply does not support the
25 conclusion that OfficeMax created intolerable or infeasible working
26 conditions that would amount to constructive discharge. See
27 McGanty v. Stadenraus, 901 P.2d 841, 853-54 (Or. 1995) (describing
28 elements of constructive discharge). Because plaintiff was not

1 constructively discharged, I turn to plaintiff's alternative claim
2 that he was terminated on the basis of disability discrimination.

3 Oregon law understands wrongful discharge as "an interstitial
4 tort, designed to fill a remedial gap where a discharge in
5 violation of public policy would be left unvindicated." Dunwoody
6 v. Handskill Corp., 60 P.3d 1135, 1139 (Or. App. 2003).
7 Accordingly, a wrongful discharge claim is preempted by the
8 availability of statutory remedies where the legislature has
9 provided (1) a remedy "adequate to protect both the interests of
10 society . . . and the interests of employees," Brown v. Transcon
11 Lines, 588 P.2d 1087, 1095 (Or. 1978), (2) which the legislature
12 intended "to abrogate or supersede any common law remedy for
13 damages," Holien v. Sears, Roebuck and Co., 689 P.2d 1292, 1300
14 (Or. 1984). Where "the statute is silent with respect to the
15 legislature's intent . . . in the absence of an explicit statement,
16 the existence of adequate remedies can be seen implicitly to
17 establish exclusivity." Olsen v. Deschutes County, 127 P.3d 655,
18 661 (Or. App.), rev. denied, 136 P.3d 1123 (Or. 2006).

19 Here, the legislature preempted a wrongful discharge claim
20 based on disability discrimination when it enacted a statutory
21 scheme that provides remedies for victims of unlawful employment
22 practices, which includes disability discrimination. Or. Rev.
23 Stat. §§ 659A.109; 659A.885. Employees who invoke the right to
24 reasonable accommodations are protected from retaliatory
25 termination. Or. Rev. Stat. § 659A.109. Aggrieved employees are
26 entitled to a jury trial upon request, and, if successful, may
27 obtain compensatory and punitive damages, and attorney fees. Or.
28 Rev. Stat. § 659A.885. Because these remedies are adequate and

1 account for all relief that would be available in a wrongful
2 discharge claim, and because the legislature has evinced its intent
3 to preclude a wrongful discharge claim by making those remedies
4 available, plaintiff's wrongful discharge claim is preempted. See
5 also Galenbeck v. Newman & Newman, Inc., No. 02-6278-HO, WL 1088289
6 at *5 (D. Or., May 14, 2004); Robinson v. U.S. Bancorp, No.
7 99-1723-ST, WL 435468, *4 (D. Or., Mar. 17, 2000) (F & R adopted by
8 Judge Jones on April 20, 2000) (holding same).

9
10 Intentional Infliction of Emotional Distress

11 In order to withstand summary judgment on the intentional
12 infliction of emotional distress claim, plaintiff must show the
13 existence of a genuine issue of material fact on each of three
14 elements: (1) intent to commit (2) actions that "extraordinarily
15 transgress[] the bounds of socially tolerable conduct" (3) and that
16 caused severe emotional distress to plaintiff. Babick v. Or. Arena
17 Corp., 40 P.3d 1059, 1063 (Or. 2001).

18 Whether a complaint sufficiently alleges conduct that
19 constituted an extraordinary transgression of the bounds of
20 socially tolerable conduct is a question of law. See id. at 1064.
21 A defendant's conduct is sufficiently transgressive when it "so
22 extreme in degree, as to go beyond all possible bounds of decency,
23 and to be regarded as atrocious, and utterly intolerable in a
24 civilized community." Christopherson v. Church of Scientology, 644
25 P.2d 577, 584 n.7 (Or. App.), rev. denied, 650 P.2d 928 (Or.
26 1982). "The defendant's conduct must be extremely outrageous, not
27 merely rude, tyrannical, churlish, or mean." Santrizos v.
28 Evergreen Federal Savings and Loan Ass'n., Civ. No. 06-886-PA, WL

1 283024, *3 (D. Or., Jan. 18, 2007). Oregon case law sets a high
2 threshold for outrageous conduct in employment contexts; "Oregon
3 appellate courts have been very hesitant to impose liability for
4 IIED claims in employment settings, even in the face of serious
5 employer misconduct," Robinson v. U.S. Bancorp, Civ. No.
6 99-1723-ST, WL 435468, *8 (D. Or., Mar. 17, 2000). Thus,
7 subjecting employees to threats of termination, tantrums, insults,
8 unreasonable demands, and discriminatory comments will not rise to
9 actionable conduct unless the employer's actions are egregiously
10 cruel. See id. (citing cases). Moreover, "[d]ischarge alone is
11 not actionable." Galenbeck v. Newman & Newman, Inc., No.
12 02-6278-HO, WL 1088289 at *8 (D. Or., May 14, 2004).

13 Plaintiff has not alleged any qualifying "outrageous" conduct.
14 Plaintiff does not specify any particular instance of conduct by
15 any agent of OfficeMax that rises to a level of unprofessionalism,
16 let alone egregious conduct. The record indicates that OfficeMax's
17 Human Resources Coordinator acted professionally in her
18 interactions with plaintiff. Plaintiff appears to rest his
19 argument instead on the assertion that loss of work during periods
20 in which OfficeMax could not offer plaintiff work that met his
21 medical restrictions caused plaintiff anxiety, depression, and
22 sleeplessness. Plaintiff's Response at 66. That bare assertion
23 fails to address the first two elements of the tort. Accordingly,
24 it is apparent that plaintiff cannot withstand OfficeMax's motion
25 for summary judgment on this claim.

26
27 Reckless Infliction of Emotional Distress

28 Nor does plaintiff's reckless infliction of emotional distress

1 claim withstand summary judgment. This court has held that Oregon
2 courts do recognize the tort of reckless infliction of emotional
3 distress. Snead v. Metropolitan Property, 909 F. Supp. 775, 779
4 (D. Or. 1996), aff'd, 116 F.3d 486 (9th Cir. 1997) ("there is no
5 cognizable claim for the reckless infliction of emotional distress
6 under the laws of the State of Oregon"). Plaintiff, however,
7 adduces Oregon appellate cases that suggest the tort may be
8 cognizable in situations where a special relationship between the
9 parties imposes a duty to safeguard against the effects of reckless
10 conduct. E.g., Hammond v. Central Lane Communications Center, 816
11 P.2d 593, 598 (Or. 1991) ("A plaintiff may recover for severe
12 emotional distress without accompanying physical injury by showing
13 recklessness or a reduced level of intent . . . when the
14 defendant's position in relation to the plaintiff involves some
15 responsibility aside from the tort itself"). Even if such a claim
16 were available, plaintiff has failed to describe any outrageous
17 conduct by any agent of OfficeMax that, whether committed
18 recklessly or intentionally, caused him harm. Again, summary
19 judgment in OfficeMax's favor is appropriate.

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1 CONCLUSION

2 Boise Cascade L.L.C.'s Motion for Summary Judgment (#35) and
3 Supplemental Motion for Summary Judgment (#127), and OfficeMax
4 Incorporated's Motion for Summary Judgment (#40) are GRANTED. This
5 action is DISMISSED.

6 IT IS SO ORDERED.

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8 Dated this 27 day of July, 2007.

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11 _____
12 THOMAS M. COFFIN
13 United States Magistrate Judge
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